IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

THURSDAY, THE 8TH MARCH 2007 / 17TH PHALGUNA 1928

CRL.A.No. 536 of 2005()

AGAINST THE ORDER IN CRLP.200/2005 Dated 11/03/2005
CC.258/2002 of JUDL.MAGISTRATE OF FIRST CLASS-I, HOSDRUG

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APPELLANT:

KARIMBIL KRISHNAN, AGED 55 YEARS,
S/O.RAMAN, RESIDING AT NHANDADI,
P.O.PADAVOOR, (VIA) CHERUVATHUR.

BY ADV. SRI.M.SANTHOSHKUMAR

RESPONDENTS:

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1. K.T.MOIDEEN KOYA, AGED 51 YEARS,
S/O.USSAIN KURIKKALKANDI AND HUSBAND OF FOUSIYA,
KOLAKANDY, P.O.PERUVATHOOR (VIA) KOILANDI.

2. THE STATE OF KERALA, REPRESENTED
BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

R1-BY ADV. SRI.MILLU DANDAPANI
R2-BY P.P.SRI.P. RAVINDRA BABU

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 08.03.2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. THANKAPPAN, J.

CRL.A.NO.536 OF 2005

Dated this the 8th day of March, 2007.

JUDGMENT

The complainant in C.C.No.258/2002 on the file of the Judicial Magistrate of First Class-I, Hosdurg, is the appellant. The appellant filed the complaint against the 1st respondent alleging that he had committed an offence punishable under Section 138 of the N.I.Act, 1881. The allegation in the complaint was that the 1st respondent/accused had issued a cheque for an amount of Rs.2,50,000/= in favour of the complainant for discharge of a debt. But, when the cheque was presented for encashment, the same was dishonoured on the ground of insufficiency of fund in the account of the account holder. Complying the statutory provisions of the issuance of notice etc., and since the 1st respondent had not paid the amount covered by the cheque, a complaint filed before the court alleging commission of the offence by the 1st respondent. The complaint was taken on file by the trial court and summons was issued to the 1st respondent/accused. Subsequently, the case was posted for evidence of the

complainant/appellant on 31.7.2004. On 31.7.2004, the complainant/appellant became absent and he applied for excuse of his absence. Hence, the case was posted to 30.10.2004 for the evidence of the appellant/complainant. On 30.10.2004 since the 1st respondent became absent, the case was adjourned to 27.11.2004. On 27.11.2004 the learned magistrate passed the impugned order by acquitting the 1st respondent on the ground that the complainant/appellant absented from the court.

2. The learned counsel appearing for the petitioner/complainant submits that the impugned order is not in accordance with the provisions of the Code of Criminal Procedure and that also against the dictum laid down by this Court as well as the Apex Court regarding exercise of the power under Section 256(1) of the Code of Criminal Procedure.

3. This Court heard the matter in detail and it is revealed that the 1st respondent was acquitted only on the ground of absence of the appellant/complainant on 27.11.2004. The

learned magistrate found that the absence of the complainant/appellant is purposeful and hence, discretion of the court has been exercised for acquitting the 1st respondent. But, as per the principles laid down by this Court in the judgment reported in **Don Bosco v. Partech Computers Ltd.** (2005(2) KLT 1003) and in **G.F.S. Chit & Loans (P) Ltd. v. Rajesh** (2006(3) KLT 825), the judgment under challenge has to be set aside. In the above judgments, this Court had categorically held that the courts should see that the discretion available to the court to pass an order under Section 256 shall be exercised judicially. That apart, in **Associated Cement Co. Ltd. v. Keshvanand** (1998 (1) KLT 179 (SC), the Apex Court had categorically held that two constraints are imposed on the court for exercising the power under Section 256(1) of the Code of Criminal Procedure. Paragraph-17 of that judgment reads as follows:

> "17. Reading the section in its entirety would reveal that two constraints are imposed on the court for exercising the power under the Section. First is, if the court thinks that in a situation it is proper to adjourn the hearing then the magistrate shall not acquit the accused. Second is, when the magistrate considers that

> personal attendance of the complainant is not necessary on that day the magistrate has the power to dispense with his attendance and proceed with the case. When the court notices that the complainant is absent on a particular day the court must consider whether personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason. If the situation does not justify the case being adjourned the court is free to dismiss the complaint and acquit the accused. But, if the presence of the complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise o f the power envisaged in the section. The discretion must therefore, be exercised judicially and fairly without impairing the cause of administration of criminal justice".

4. From the reading of the order impugned, it is very clear that the trial court had not exercised its discretion judicially and applied its mind properly for ordering acquittal of the 1st respondent.

In the above circumstances, the judgment under appeal stands set aside and the matter is remanded back to the trial court and the trial court is directed to take back the file and proceed with the case from the stage before the impugned

order has been passed. The parties shall appear before the court below on 20.4.2007. The records, if any received by this Court, shall be sent back to the lower court.

K. THANKAPPAN, JUDGE.

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